

The Myth Of The Forceful Mediator

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Recently, I was talking with a friend, a bet-your-company case litigator from New York City. When the topic turned to mediation, the conversation took a turn commonly taken when I talk with lawyers who either started out or ended up in the Big Apple:

“Do you know what I wish mediators would do?”

“Please tell me.”

“Be more forceful. I wish that mediators would be more forceful. Even with me.”


Forceful top-gun litigators, from New York City and elsewhere, have been making this request for years. But mediators seem not to comply. Because the requests continue. Why is this?

The reason is straightforward: When mediators rely on force to get cases settled, it doesn't work. The purpose of this article, therefore, is to break this cycle. It's time to debunk the myth of the forceful mediator, and to suggest more productive ways for top-gun litigators and top-flight mediators to engage.

There are a few self-styled elite mediators who work in New York City and claim success through forcefulness, their ability to whup good lawyers into submission. They are mainly retired judges who rely on their high status, rather than mediation skills, to generate work. Since this forcefulness is claimed to be effective, we must ask: Does it really work? And, even if it does get cases settled, is this forcefulness good for the lawyers on the receiving end of the whupping, or for their clients? And, are there ways to get cases settled without suffering the ills that mediator forcefulness causes?



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I question forceful mediation for several reasons. First, I wonder why adults put up with being scolded, yelled and cussed at by the "Forceful Few." Who likes to be treated this way? Second, I wonder about the impact of this conduct on the relationship between lawyers and their clients. Does it not hurt a lawyer's relationship with the client when a member of the Forceful Few shows that lawyer up, makes him wrong, in the presence of his client? Finally, does not this mediator forcefulness naturally call forth forceful resistance from the lawyer, and actually make settlements harder to achieve?

My own experience is that a lawyer's natural response to mediator force is forceful resistance. This is especially, but far from exclusively, true among New Yorkers. When I have tried to be forceful (usually with a lawyer who is obviously wrong about a position, but stubbornly persists despite all entreaties to logic), I have usually gotten a response along the lines of, "Who are you to tell me I am wrong? I have been living with this case for months [or sometimes, years], I have read all the documents, I have attended the depositions, I have the seen how the judge reacts to all of this at numerous hearings. All you know is what you read in the brief that my associate threw together for you two days ago." Other mediators tell me that their experiences are similar.

At this point, force causes arguments to ensue, conversations to deteriorate and settlements to be lost. The lawyers' response is so natural that we should view it as an application of Newton's Third Law: "For every action, there is an equal and opposite reaction." Mediator force begets lawyer force in return, usually along the lines described above. It is nearly impossible for a mediator to win an argument with a lawyer who believes that he is better prepared than the mediator on the facts and law of the case. The Forceful Few think that the settlements are lost because the lawyers are just so darn stubborn. But it's not so simple. It's the Forceful Few's own conduct which provokes and causes the attorney stubbornness of which these mediators complain. For mediator force to work, especially with top-gun lawyers, that force has to be so overwhelming, such a clear showing that the lawyer is "wrong," that it virtually guarantees damage to that lawyer's relationship with their client.

So the use of force by mediators is just not worth it. And, fortunately, there are better ways.




The answer comes from a different New York City tradition and style. Francis Wellman was a New York City legend; Manhattan's most outstanding trial lawyer a century ago. Wellman's classic, "The Art of Cross-Examination" (1903), is still a must-read for students of the game. Wellman urged lawyers to sail past the siren song of head-on, forceful confrontations in cross-examination for the same reasons that forceful confrontation is a trap for mediators. Subtlety, to the extent we can muster and master it, is more effective, in cross-examination and mediation, in New York City and throughout the country, then and now. Here's what Wellman learned from his New York City trial practice:

"It is absurd to suppose that any witness who has sworn positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People as a rule do not reflect upon their meagre opportunities for observing facts, and rarely suspect the frailty of their own powers of observation. They come to court, when summoned as witnesses, prepared to tell what they think they know; and in the beginning they resent an attack upon their story as they would one upon their integrity.


"If the cross-examiner allows the witness to see, by his manner toward him at the start, that he distrusts his integrity, he will straighten himself in the witness chair and mentally defy him at once. If, on the other hand, the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly be induced to enter into a discussion of his testimony in a fair-minded spirit, which, if the cross examiner is clever, will soon disclose the weak points in the testimony."

Wellman, pp. 27-28.

Wellman's teachings about cross-examination equally inform the tough-love conversations between mediators and lawyers which are at the heart of good mediation. It is the rare lawyer who is going to be readily induced to acknowledge that his theory of the case is all wet. If lawyers think they are under attack by mediators, especially in front of their clients, they will straighten in their chairs and defy the mediators at once. So, instead of using force, we mediators, like Wellman's model New York City cross examiner, try to be "courteous and



conciliatory” to the mistaken lawyer (who is, after all, still a client of the mediator and entitled to courteous treatment for that reason alone).



We want to enter into a discussion of the lawyer’s theory of the case in a fair-minded spirit. If the mediator is good, the lawyer will begin to see weaknesses he had not seen before. Many times, I feel as if I am conducting a first-year law class using the Socratic method with a lawyer. If I can ask questions skillfully, and in an honest spirit of curiosity and helpfulness, in a search for truth, mistaken lawyers often realize, seemingly all by themselves, that they have issues.

I am not aware of mediation training anywhere in the country which teaches that scolding, yelling, cussing or other varieties of confrontation and “forcefulness” are anything other than desperation moves, to be avoided in favor of more subtle techniques. And, from my own personal experience, I can tell you that I have used more subtle techniques with top-gun lawyers from all over the country, including from New York City, achieving settlements if settlements are at all reasonably possible, without the damage that “forceful” mediation can cause.


A Postscript

In 1981 or 1982, as an associate in a Los Angeles law firm, I attended a program on professionalism for young lawyers presented by Ellis Horvitz, California’s premier appellate lawyer, universally esteemed then even as he is now, in retirement, as a lion of the bar.

The program took place at Kowloon on Pico near La Cienega, maybe two miles east of Century City where I worked, a restaurant where my parents occasionally liked to go for Chinese food.

As I looked at Horvitz across the dining room eating lunch that day before his talk, I remember thinking he was a very old man. He was probably 55.

When Horvitz was formally introduced, he calmly brushed by Kowloon’s plastic palm trees and ersatz tikis, and took his place behind a small podium. About 75 of us associates waited in eager silence.



“Over the many years...” the mandarin began, “many of our most crushing defeats ...” he said before a long pause, “have come at the hands ...” slowly, slowly, before another long pause, keeping all of us at the edge of our seats, “... of perfect ladies and gentlemen.”

I have never forgotten that lesson. That’s the way to be a lawyer. It’s the way to be a mediator, too.

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